

STATEMENT OF R. BLAIR STRONG
OPPOSING SB 471

Mr. Chairman, Members of the Committee: My name is Blair Strong, and I am presenting a statement opposing SB 471.

Two bills before you today concern a similar topic. SB 435 would subordinate water rights associated with power plants, in general. SB 471 is a rifle shot aimed specifically at Avista Corporation and would subordinate water rights associated with Avista's Noxon Rapids Project.

SB 471 would amend Mont Code Annotated Section 85-1-122. This section presently deals with the Cabinet Gorge dam located in Idaho.

Some background concerning why the original Section 85-1-122 was considered necessary might be helpful. As you may know, the headwaters of the Clark Fork River are in the vicinity of Drummond. The Clark Fork river runs gradually north and west as it passes through the Milltown Dam location, near Missoula, and the Thompson Falls Dam in Sanders County. The Thompson Falls dam was built in the early 20th century and is presently owned by PPL Montana. From Thompson Falls, the Clark Fork River runs approximately 40 miles where it passes through the Noxon Rapids Dam owned by Avista in the western part of Sanders County. Much of the present day river between Thompson Falls and Noxon is the reservoir or backwater from the Noxon Dam. From Noxon the river runs approximately 22 miles until it reaches the Cabinet Gorge Dam in Idaho. Much of the present day river between the Noxon Rapids Dam and the Cabinet Gorge Dam is the reservoir and backwater of the Cabinet Gorge Dam. From the Cabinet Gorge dam, the water from the Clark Fork runs a few miles into Lake Pend Oreille, and then follows the Pend Oreille river which passes

through a portion of the Washington, into British Columbia in Canada where it joins the Columbia River. The Columbia River, of course, reenters the United States from Canada, flows across Washington and eventually to the Pacific Ocean.

Section 85-1-122 was enacted by the legislature in 1951 to deal with Cabinet Gorge Dam. Why was a special act necessary in 1951? The immediate reason was that the federal government was requesting Avista, then known as the Washington Water Power Company to complete construction of the Cabinet gorge Dam as quickly as it could to supply power to important war related industries, particularly aluminum companies in the Northwest, during the Korean War.

The legal reason for a special act was set forth in the a letter of Gov. John W. Bonner, dated January 25, 1951, which was published in this Senate's journal. As indicated by Gov. Bonner, then existing Montana law (which has been repealed) provided that no waters would be impounded in Montana for the use of other States without the express approval of the legislature. (RCM 89-846) By its enactment of Section 85-1-122 in 1951, the legislature gave its express approval to the impoundment of water in Montana resulting from the Cabinet Gorge Dam in Idaho. It is also clear from Gov Bonner's letter that he was concerned that Montana stake a claim to waters within the Montana that flow into the Columbia river system and secure Montana's right to demand an allocation of water for Montana if and when an interstate Compact were negotiated concerning the allocation of the waters of the Columbia River Basin.

The question was asked last week whether this section applied to Avista's water rights associated with the Noxon Rapids Dam, in as much as the Noxon Rapids Dam may be within 25 miles of the Idaho border. The

answer is no, for two reasons. First, Section 85-1-122 refers expressly to a dam located in Idaho: "The waters of the Clark Fork river may be impounded or restrained within the state of Montana for a distance not exceeding 25 miles from the Idaho-Montana boundary line by a dam located on said river in the state of Idaho... Second, it is clear from Governor Bonner's letter that the state knew that the Noxon Rapids site was a possible site for future hydroelectric development. In fact, a concern in his letter was that the Cabinet Gorge reservoir not flood the locations of possible future dams, including one at Noxon. If the legislature had wanted to subordinate the water rights associated with the Noxon Dam, it clearly knew about the Noxon Rapids and could have enacted special provisions relating to that site, if it had chosen to do so.

No special law was necessary for Noxon, because the Noxon dam and reservoir are wholly located in Montana, and the usual circumstance of an impoundment in Montana resulting from a dam in another state was not a concern. Therefore, Avista obtained the right to impound and use water at Noxon in accordance with Montana water law in the same manner as any other water users. And, when the water law was changed requiring permits to be issued by DNRC for new water rights uses, Avista applied for and received a provisional water use permit in order to allow for the installation and use of an additional turbine generator at Noxon.

SB 471 goes far beyond the original MCA Section 85-1-122 in attempting to single out Avista's rights for subordination. It does this by amending the language of the section so that it applies to Noxon Rapids, which is within 25 miles of the state boundary. There is only one company that fits this description – my client, Avista. There are at least three problems with this approach:

First, SB 471 creates an unconstitutional classification based upon the type of water right by creating a class with one member – Avista corporation. This contravenes the 1889 Montana Constitution and the 1972 Constitutions which gave no priority as between types of water uses – all types of water use are considered equal in the eyes of Montana law. Some states, like Idaho, have established preferences as between types of water rights. This is not so in Montana. Montana's constitution does not establish any such preference among classes of water users. There is no basis in the Montana constitution for singling out Avista's Noxon Rapids project.

Second, by subordinating Avista's water right, SB 471 would violate the 1972 Montana Constitution which "confirms" existing Water Rights (*Article IX, Section 3*), and which requires compensation to be paid for a taking or damaging of property rights (*Article II, Section 29*). It is questionable whether any subordination could even be attempted other than by constitutional amendment, and then only if preexisting rights were adequately compensated. SB 471 would in effect "take" or "damage" a valuable part of the water right - the priority date - without compensating Avista.

A third problem with the SB 471 is the manner in which it rewords Sec 85-1-122. As reworded, the section authorizes an impoundment resulting from the Cabinet Gorge Dam and the Noxon Rapids Dam only "for a distance not exceeding 25 miles from the Idaho-Montana boundary line." The Noxon Rapids Dam is about 22 miles from the border, but most of its reservoir is more than 25 miles from the boundary line. Therefore, SB 471 may revoke Avista's legal right to maintain the great majority of the Noxon Rapids reservoir. This revocation of its right to have a reservoir outside of a

25 mile zone also would be an unconstitutional taking or damaging of Avista's preexisting property rights.

Like SB 435, SB 471 fails constitutional muster. Avista's dam and reservoir at the Noxon Rapids are wholly located in Montana, and water rights were obtained by appropriation in the same manner as were other water rights. SB 471 ^{subordinates} ~~by subordinating~~ them to upstream irrigation and domestic rights, without providing for fair compensation to Avista. For those reasons, I recommend that the committee adopt a do not pass recommendation. Thank-you.